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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH RICHARD ROWELL,

Defendant.

NO: CR-13-6070-WFN

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION FOR
DISCOVERY

The Plaintiff, United States of America, by and through MICHAEL C. ORMSBY, United States Attorney for the Eastern District of Washington, and ALEXANDER C. EKSTROM, Assistant United States Attorney for the Eastern District of Washington, responds to the Defendant's Motion for Discovery and Pre-Trial Disclosures (ECF No. 40) as follows:

1. Disclosure of Brady Materials:

The Government's disclosure includes all exculpatory evidence known to the Government. The Government is unaware at this time of any such evidence not set forth in the reports.

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION FOR
DISCOVERY

1 a. Bias of government witnesses:

2 The Government is unaware of any evidence that any prospective government witness
3 is biased or prejudiced against the Defendant, or has motive to falsify or distort his/her
4 testimony.
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6 b. Prior record/other acts of Government witnesses:

7 The Government is unaware of any prospective witness has engaged in any
8 criminal acts.
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10 c. Investigation of witnesses:

11 The Government is unaware that any prospective witness is under investigation
12 by any law enforcement agency.
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14 d. Evidence regarding ability to testify:

15 The Government is unaware of any evidence that any prospective witness is
16 impaired in the ability to perceive, remember, communicate or tell the truth. The
17 Government will determine whether any prospective witness has been treated for any
18 medical or psychiatric condition, and whether any witness has used controlled
19 substances or has been an alcoholic.
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22 e. Personnel files:

23 The Government will examine the personnel files of any federal law
24 enforcement witnesses for information with respect to request a-d noted above, and
25 the existence of any impeaching information. The defendant cites *United States v.*
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27 GOVERNMENT'S RESPONSE TO
28 DEFENDANT'S MOTION FOR
DISCOVERY

1 *Henthorn*, 931 F.2d 29 (9th Cir. 1991), in requesting that the Government review the
2 personnel files of state and local police officers. (ECF No. 40 at 3). However,
3 *Henthorn* is limited to an examination of personnel files pertaining to federal law
4 enforcement witnesses. *United States v. Henthorn*, 931 F.2d at 29, FN2. The
5 government makes the same requests of state authorities, and has consistently received
6 cooperation with these requests, however the government lacks the authority to
7 compel another sovereign.
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10 Nor does the case support that the AUSA assigned to the case must personally
11 review the records. *United States v. Jennings*, 960 F.2d 1488, 1491-1492 (9th Cir.
12 1992)(no duty of individual AUSA review), see also *United States v. Dominquez-*
13 *Villa*, 954 F.2d 562, 565 (9th Cir. 1992)(same). Such a practice could make the
14 government attorney of record a witness in this proceeding. Consistent with
15 *Henthorn*, government personnel, other than the undersigned, will investigate to
16 determine whether any *Brady* and/or *Giglio* material is contained within the
17 employment files of witness-agents only.
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21 f. Favorable testimony:

22 The reports provided in discovery contains all evidence and information
23 regarding any witness with or who could testify favorable for the Defendant. The
24 Government is unaware of any witness whose testimony is favorable to the Defendant.
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2. Identity of Cooperating Witnesses, Co-defendants, Persons, or Informants:

The Government is entitled to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). This entitlement, generally referred to as the informer's privilege, is, however, subject to certain limits requiring disclosure. In *Roviaro* the Supreme Court held that disclosure is required where the disclosure of an informer's identity is mandated by the fundamental requirements of fairness. Where the disclosure of an informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the informer's privilege must give way. *Id.* at 60-61.

In this matter, there was an informant, should the Government choose to call the informant as a witness in its case-in-chief, the Government will provide information regarding the informant, including impeachment material, two weeks in advance of trial. The Government would object to item i., as not supported by circuit law.

3. Production of Statements of Defendant:

The circumstances and content of any statement(s) made by the Defendant are contained in the discovery previously provided to the Defendant.

1 4. Disclosure of Defendant's Criminal History:

2 The Government believes that the defendant's criminal history is correctly
3 listed in the Pre-Trial Services Report.

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5 5. Disclosure of Tangible Objects:

6 Any evidence seized in connection with this case is currently in the possession
7 of the Tri-City Metro Drug Task Force and/or the Drug enforcement Agency, and may
8 be examined and copied by contacting Task Force Detective Kevin Barton. Video
9 records of the Defendant during the offense have previously been provided, and
10 copies of the recorded buy funds have been requested.

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13 6. Disclosure of Reports of Examinations and Tests:

14 The reports of any examinations or test performed were provided as part of the
15 discovery provided the Defendant. Any additional reports will be provided as
16 received.

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18 7. Expert Witnesses:

19 The Government shall provide a summary of qualifications and Rule 16
20 Summary for any expert to be called as a witness prior to trial. As to the request for
21 training manuals, the request is vague, and should be denied absent clarification and
22 provision of some particularized basis for the request.
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8. Production of Reports:

All reports prepared in connection with this matter have been provided as part of the discovery, with the exception of reports that would reveal the identity of the informant. Any additional reports received will be provided as discovery, or as indicated above. The Government will not provide officer's notes or memorandum, or draft reports, as such are not required under the applicable rules.

9. Production of Statements:

The Government shall provide any witness statements not previously provided in the discovery as required by Federal Rule of Criminal Procedure 26.2.

10. Witness Lists:

While not entirely clear, it appears the Defendant is requesting a general witness list. (ECF No. 40, pg. 10). The names of witnesses are contained in the discovery previously provided to the Defendant. No discovery rule or statute requires the requested information be provided or access given to such persons. In a non-capital case the Defendant has no right to discover the names and addresses of prospective government witnesses prior to trial. *United States v. Steel*, 759 F.2d 706, 709 (9th Cir. 1985). Thus, a defendant has no general right to a list of witnesses or the witnesses addresses from the Government. *United States v. Dreitzler*, 577 F.2d 539 (9th Cir. 1978), *cert denied*, 440 U.S. 921 (1979); *Yeargain v. United States*, 314 F.2d 881 (9th Cir. 1963). *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008)(en
GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION FOR
DISCOVERY

1 banc), it is the exception that proves the rule below of the Jencks Act. *W.R. Grace*
2 dealt with a District Court's order requiring production of a witness list where the
3 district court, recognizing the magnitude of the case - with a relevant time period
4 spanning nearly 30 years and potentially more than a thousand victims - held a pretrial
5 case management conference in March 2005 and thereafter entered a case
6 management order memorializing the results of the conference. *Id.* at 503. While,
7 under its inherent powers, the District Court may in appropriate circumstances, order
8 the production of a witness list, this case is not *W.R. Grace*. *Id.* at 513. This is
9 particularly true where no particularized showing has been made for the need of such
10 production. The reports are clear as who are the percipient witnesses in this single-
11 count indictment. To require disclosure of the names of potential Government
12 witnesses would give little, if any, meaning to the Jencks Act (18 U.S.C. Section
13 3500), the purpose of which is, in part, to protect witnesses from harm or influence
14 and inconvenience.

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16 If the Defendant cites to *Cadet* for the proposition that the Government, having
17 provided known exculpatory evidence, has the duty to prepare a list of percipient
18 witnesses that it intends not to call at trial (a sort of inverse witness list), he misreads
19 the case. (ECF No. 40 at 10, *citing United States v. Cadet*, 727 F.2d 1453, 1469 (9th
20 Cir. 1984)). It is clear in context that the issue was, given the Government's limited
21 disclosure of witnesses in *Cadet*, whether there was an obligation for the Government

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27 GOVERNMENT'S RESPONSE TO
28 DEFENDANT'S MOTION FOR
DISCOVERY

1 to disclose names of known percipient witnesses and their contact information so that
2 the Defense could interview them and determine whether they had favorable
3 testimony. *Cadet*, 727 F.2d at 1469. This is the meaning of *Cadet*; it does not create
4 a duty of a party to generate a list of witnesses previously disclosed that a party does
5 not intend to call. *United States v. Wright*, 625 F.3d 583, 616 (9th Cir.
6 2010)(in...*Cadet*...we held that the government is required to identify witnesses to the
7 crime whose testimony may be exculpatory. It was in that context that we observed
8 that [b]oth sides have an equal right, and should have an equal opportunity, to
9 interview [such witnesses])(citing to *Cadet*, 727 F.2d at 1469).
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13 11. Grand Jury Transcripts:

14 The Defendant seeks an order compelling the pretrial production of transcripts
15 of the testimony of witnesses offered by the Government before the Grand Jury,
16 arguing without authority that, because they would need to be ordered before trial to
17 be available when needed, that the transcripts should be disclosed when created.
18 (ECF No. 22 at 10). The applicable statutes and rules are 18 U.S.C. Section 3500 and
19 F.R.C.P. 6 and 26.2. No statement of any government witness or prospective witness
20 shall be subject to subpoena, inspection or discovery until such witness has testified
21 on direct examination in the trial of the case. 18 U.S.C. Section 3500(a). As defined,
22 statement includes a statement made by the witness to a grand jury. 18 U.S.C. Section
23 3500(e)(3). After a witness has testified on direct examination, the court, on motion
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27 GOVERNMENT'S RESPONSE TO
28 DEFENDANT'S MOTION FOR
DISCOVERY

1 of a party, shall order the production of any statement of a witness in the
2 government's possession which relates to the subject matter concerning which the
3 witness has testified. F.R.C.P. 26.2(a). The definition of a statement in this rule
4 mirrors that of 18 U.S.C. 3500(e)(3) as noted above. See: F.R.C.P. 26.2(f)(3).
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6 F.R.C.P. 6(e) addresses disclosure of Grand Jury information, and specifically,
7 disclosure upon the request of a criminal defendant. Such disclosure shall be made
8 upon a showing that grounds may exist to dismiss the indictment because of a matter
9 that occurred before the grand jury. F.R.C.P. 6(e)(3)(E)(ii). The defendant has made
10 no showing sufficient to meet the requirements of the rule.
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13 The Government would suggest that nothing the defendant asserts in fact
14 provides authority for the Court to order the requested discovery, which is clearly
15 contrary to the applicable provisions of the statutes and rules. The provisions of
16 F.R.C.P. 16 limit discovery of certain materials, and specifically excludes statements
17 of government witnesses (except as provided for in 18 U.S.C. Section 3500) and the
18 recorded proceedings of the Grand Jury. Amendment VI of the United States
19 Constitution establishes the defendant's right to a speedy, public trial, to be informed
20 of the nature and cause of the accusation, have the assistance of counsel and to
21 confront the witnesses against him. It does not, however, address the issue of
22 discovery. It clearly provides no support for the defendant's motion.
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27 GOVERNMENT'S RESPONSE TO
28 DEFENDANT'S MOTION FOR
DISCOVERY

1 The Government has no objection to the motion, to the extent it asks for
2 production a week prior to trial. While not required by the rule, in the interest of
3 expediting the trial process, the Government has no objection to providing such
4 transcripts a week prior to trial.
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6 12. FRE 404(b) & 609:

7 a. Admission of FRE 404(b) Evidence:

8 Federal Rule of Evidence 404(b) provides that:
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10 Evidence of other crimes, wrongs or acts by an accused or party are
11 admissible to prove intent, knowledge, absence of mistake, motive, plan,
12 common scheme, or design, opportunity, or other legitimate purpose.

13 The 9th Circuit has routinely acknowledged that this "rule is one of inclusion
14 and that other acts evidence is admissible whenever relevant to an issue other than the
15 defendant's criminal propensity." *United States v. Mehrmanesh*, 689 F.2d 822, 830
16 (9th Cir. 1982). Accordingly, 404(b) evidence is admissible "except where it tends to
17 prove only criminal disposition." *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir.
18 1977). The 9th Circuit has recognized a four-part test for admission of 404(b)
19 evidence, as follows:
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- 22 (1) the evidence tends to prove a material issue in the case;
23 (2) the prior act is not too remote in time;
24 (3) the evidence is sufficient to support a finding that the defendant committed
25 the other act; and
26 (4) in certain instances, the act(s) must be similar to the offense charged.

1 *United States v. Mayans*, 17 F.3d 1174 at 1181 (9th Cir. 1995). If these factors
2 are satisfied, then the court must conduct a 403 balancing test to determine whether
3 the probative value of the evidence outweighs its prejudicial impact. *United States v.*
4 *Basinger*, 60 F.3d 1400, 1404-1408 (9th cir. 1995).

6 The Government believes that the Defendant's criminal history is
7 correctly set forth in the Pretrial Services Report (ECF No. 13). The Government is
8 currently unaware of any evidence that it would seek to offer under the rule. The
9 Government would reserve its right to supplement this response should any
10 information come to light.

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13 b. Admission of FRE 609 Evidence:

14 Rule 609(a)(1) provides in pertinent part, "evidence that an accused has
15 been convicted of [a crime punishable by death or imprisonment in excess of one
16 year] shall be admitted if the court determines that the probative value of admitting
17 this evidence outweighs its prejudicial effect to the accused." The Ninth Circuit has
18 outlined five factors that should guide the district court's decision whether to admit
19 evidence under Rule 609(a)(1):
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- 22 1. the impeachment value of the prior crime
- 23 2. the point in time of the conviction and the witness' subsequent history
- 24 3. the similarity between the past crime and the charged crime
- 25 4. the importance of the defendant's testimony
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27 GOVERNMENT'S RESPONSE TO
28 DEFENDANT'S MOTION FOR
DISCOVERY

1 5. the centrality of the credibility issue

2 See *United States v. Cook*, 608 F.2d 1175, 1185 n. 8 (9th Cir. 1979)(*en banc*);
3 see also *United States v. Wallace*, 848 F.2d 1464, 1473 n. 12 (9th Cir. 1988).

4 Although the trial judge is not required to state his or her analysis of each of the five
5 factors with special precision, "the record should reveal, at a minimum, that the trial
6 judge 'was aware of the requirements of Rule 609(a)(1).' " *Wallace*, 848 F.2d at 1473
7 (quoting *United States v. Givens*, 767 F.2d 574, 579-80 (9th Cir. 1985)).
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10 The Government hereby provides notice under the rule of the following
11 convictions, which are listed in the Pretrial Services Report:
12

13 1) Second Degree Possession Of Stolen Property – Trafficking - Benton
14 County Cause Number 10-1-00102-0

15 The Government is currently unaware of any additional evidence that it would
16 seek to offer under the rule. The Government reserves its right to supplement this
17 response if additional criminal history is found.
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19 13. Timing of Production:
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21 The Defendant has been provided with all discoverable materials as authorized
22 by court order, Federal Rules of Procedure, local court rules and the Constitution,
23 including but not limited to specific items requested in the motion. The Government
24 will furnish additional items of discovery if and when they are received.
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27 GOVERNMENT'S RESPONSE TO
28 DEFENDANT'S MOTION FOR
DISCOVERY

1 If the Defendant believes that required disclosures have not been made, the Defendant
2 should be required to direct his discovery requests to those specific areas about which
3 he is concerned or believes the Government has not complied.

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5 **REQUEST FOR RECIPROCAL DISCOVERY**

6 The Defendant has invoked Fed. R. of Crim. P. 16(a) in his motion for
7 discovery. Since the government has voluntarily complied with the requirements of
8 that rule, the government demands reciprocal discovery from the defendant pursuant
9 to the provisions of Fed. R. of Crim. P. 16(b). The government further requests timely
10 disclosure and production of said evidence to enable the government to adequately
11 prepare a rebuttal to the defendant's case-in-chief.
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14 Respectfully submitted this 4th day of February, 2014.
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17 **MICHAEL C. ORMSBY**
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19 S/ Alexander C. Ekstrom
ALEXANDER C. EKSTROM
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27 GOVERNMENT'S RESPONSE TO
28 DEFENDANT'S MOTION FOR
DISCOVERY

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3 I hereby certify that on February 4, 2014, I electronically filed the foregoing with the
4 Clerk of the Court using the CM/ECF System which will send notification of such
5 filing to the following: Rick L. Hoffman.
6

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27 GOVERNMENT'S RESPONSE TO
28 DEFENDANT'S MOTION FOR
DISCOVERY